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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~285~~ 10

RATNER, et al.
Petitioners,

vs.

STATE OF CALIFORNIA
Respondent.

Opposition to Petition for a Writ of Certiorari to the Appellate Division of the Superior Court, County of San Mateo, State of California

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Brief for Respondent in Opposition

OPINION BELOW

Appellant was found guilty of violating section 311.2 of the California Penal Code following a jury trial in the Municipal Court, Southern Judicial District, County of San Mateo.

The judgment was affirmed by the Appellate Division of the Superior Court, County of San Mateo. That opinion was not published but is attached to this Opposition as Appendix "A."

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Should this Court's review of state obscenity convictions consist of anything more than an examination of the constitutional standards applied by the lower courts?

STATEMENT OF THE CASE

On July 21, 1964, judgment was entered finding petitioners guilty of violating California Penal Code section 311.2,[1] following a jury trial.

On March 31, 1965, the Appellate Division of the Superior Court, County of San Mateo, State of California, affirmed the judgment. On June 24, 1965, a Petition for Writ of Certiorari was filed with this Court, and on October 8, 1965, respondent was requested to file an opposition.

STATEMENT OF FACTS

The only factual matters before the Court on this petition are the contents of the film "Honey Bee." While petitioner describes the film as "a nude figure study" (Petition, pp. 7-8), and states that the subject "does not . . . perform any sensuous movements," it is apparent from a viewing of the film that these are the words of an advocate. The basic fact remains that a jury in San Mateo County, applying the standards set out by this Court and the California Supreme Court, found that the film went substantially "beyond the pale of contemporary notions of rudimentary decency" and was "utterly without redeeming social importance." *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962); Cal. Pen. Code § 311.

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1. 311.2. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

ARGUMENT

Since the Standards Enunciated by This Court Were Meticulously Applied by the State Courts, the Petition Should Be Denied.

The delicate determination whether a particular matter is "obscene" and may constitutionally be proscribed has been denominated a matter of "constitutional fact." *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 910, 31 Cal. Rptr. 800, 806, 383 P.2d 152, 158 (1963). That determination is ordinarily not only a matter of historical fact but necessarily implicates an issue of constitutional law. *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964).

The proper standard for testing alleged obscene matter has been constructed by this Court in a series of decisions starting with *Roth v. United States*, 354 U.S. 476 (1957), and culminating with *Jacobellis v. Ohio, supra*, 378 U.S. 184 (1964). No question is raised in the petition that the jury, the trial court and the appellate court did not apply the precise standards enunciated in that sequence of cases.

Therefore, the sole question on this petition is whether this Court intends personally to review every single state court finding of obscenity notwithstanding that the clear pronouncements of the Court were followed to the letter.[2] Two factors bear on this question: (1) The thousands upon thousands of individual books, pamphlets and films which are at least arguably beyond constitutional protection; and (2) The effect upon community life and morale implicit in such a time-consuming and uncertain course.

We concur in the Court's ruling that the quality of literary material to be freely availabe to a nation of two

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2. We should like to make it clear that this response in opposition to the petition has as its purpose persuading the Court to deny the petition at this point. However, in the event the Court sees fit to grant the petition, we respectfully request the opportunity to discuss on the merits why this film is obscene.

hundred million people should not be left in the hands of jurors or law enforcement officials representing a single community. We also agree with the statement of this Court that, "Their [jurors and law enforcement officials] decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court." *Jacobellis v. Ohio, supra,* 378 U.S. at 188-89 n. 3.

Our thesis may be stated very simply: When a jury, under proper instructions, finds that a work is obscene, and the jury's ruling is reviewed by an appellate court under standards set by this Court, then the Court should interfere with that judgment only to the extent that improper constitutional standards were applied to test the material. This limitation would, of course, be qualified in cases where the actions of law enforcement officials in seizing the materials are at issue. *Cf. Marcus v. Search Warrants,* 367 U.S. 717 (1961).

We do not take this position without some measure of support among the members of the Court. See *Jacobellis v. Ohio, supra,* 378 U.S. at 199, 203 (dissenting opinion of Warren, C. J., joined by Clark, J., and separate dissenting opinion of Harlan, J.). Moreover, while Mr. Justice Stewart concurred in the reversal of the conviction in *Jacobellis,* it is certainly not clear that he concurred in the view that the Court should review every single state conviction notwithstanding a careful and correct application of its rulings.

It would be needlessly redundant in light of the dissenting opinions in *Jacobellis* to restate the argument against this proposition. However, perhaps the most persuasive reasons not mentioned there against such a course of action lie in its impact upon the morale of the people of this country who are attempting to protect their communities from the increasing flow of base and often disgusting mate-

rial being emitted today by persons and groups such as petitioner.

We concede that the line between what is obscene and what is constitutionally protected is not often clear; but, recognition of that fact does not mean that it cannot be ascertained at all. The point has now been reached where there are recognizable standards, and those standards were meticulously applied in the case at bar. "Honey Bee" was found, first of all, to go "substantially beyond customary limits of candor in description or representation of [the] matters" that it was designed to describe. *Roth v. United States, supra,* 354 U.S. at 487. Secondly, it was found to be matter that is "utterly without redeeming social importance." Cal. Pen. Code § 311. The appellate court, in affirming the conviction, expressly found the film to be "hard core pornography," the only label for matter "utterly without redeeming social importance." *Zeitlin v. Arnebergh, supra,* 59 Cal. 2d at 920-21, 31 Cal. Rptr. at 812-13, 383 P.2d at 164-65. These findings, and the standards followed by the state court in reaching those findings, mirror in every detail the rulings and standards announced by this Court.

For this Court now to find this film not obscene would be to say not only to the people of San Mateo County, but to every community throughout the United States, that they have no real voice in defining the standards by which their citizens shall live. At best, to define "obscene" or "hard core pornography" is a difficult if not impossible task. But this Court's role is fulfilled to a great extent when the all-important standards and guidelines are developed. For the Court to overlay its personal opinion, or at least a majority's opinion, that this film does not violate standards of decency would subvert the respect due it as one of the great institutions of our government. But what is even more ominous, it would reflect a basic lack of confidence in the

ability of communities to pass upon questions affecting the quality and tone of community life.

One of the great bulwarks of federalism has been that the measure and quality of community life in this country is primarily the responsibility of the community itself. Recognizing that there are important First Amendment issues inextricably entwined with these determinations, we respectfully submit that a denial of certiorari would constitute a vote of confidence in the people's ability to govern their own affairs.

The inevitable delay of months and even years implicit in petitioner's argument constitutes a virtual license to unscrupulous individuals who would prey upon the public. We know that this is not the intent of the Court, and we ask that the Court squarely reject petitioner's argument for the sake of the public morale.

CONCLUSION

The standards enunciated by this Court in a long line of cases were meticulously applied in this case by the jury, the trial court and the appellate court. For the reasons stated above, we respectfully submit that appellant's fate has been in good and responsible hands; that he has had his full measure of justice within the framework of contemporary American law. The petition should, therefore, be denied.

Dated: November 18, 1965

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(Appendix A Follows)

Appendix A

Memorandum Decision

In the Superior Court of the State of California for the County of San Mateo, Appellate Division.

The People of the State of California, Plaintiff and Respondent, vs. Sam Ratner and Gary Clarence Morton, Defendants and Appellants. On Appeal—Criminal No. AD 209.

Filed, Mar. 31, 1965.

This is an appeal from a judgment of conviction following a jury trial. The grounds upon which the Appellants rely is that the motion picture film "HONEY BEE," upon which the Appellants were convicted in Count Five of the complaint, is not obscene as a matter of law, but rather constitutionally protected material.

In *Zietlin vs. Arnebough, 59 Cal. 2d 901,* the Supreme Court of the State of California, following decisions of the Supreme Court of the United States, held that the courts are the final arbiters as to whether the involved material is obscene as a matter of law. This we accept and have viewed the picture "HONEY BEE," which is the involved matter in our instant case.

We then review the cases cited by Appellant and Respondent to find the standards and tests for our determination herein. In *Jacobelis vs. Ohio, 84 Supreme Court 1676,* the Supreme Court of the United States attempts to set forth the standards and tests. Here we find six Justices concurring in the reversal of a judgment and three dissenting. The six Justices voting for reversal were unable to agree upon an opinion in support of a decision. Two of the Justices reapply the test of *Roth vs. United States, 354 U.S. 386;* two take the attitude that there should be no conviction for exhibiting a motion picture as this would abridge the freedom of the press as safeguarded by the First Amend-

ment, which is obligatory upon the states by the Fourteenth Amendment. A fifth Justice states his reasons that under the First and Fourteenth Amendments, criminal laws in this area are Constitutionally limited to hard-core pornography, and he further stated that he did not intend at the time of the rendering of the opinion to find the kinds of material to be embraced in that description and perhaps could never succeed in intelligibly doing so. He does state that he "knows it when he sees it." Another Justice voted for reversal without any opinion.

On the dissenting side, we find two Justices reapplying *Roth*, but they would apply a "sufficient evidence" standard of review. The third dissenting Justice would apply Roth in an amplified way, and "would not prohibit a state from banning any material which, taken as a whole, has been reasonably found in a state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."

We then turn to the Supreme Court of California and the unanimous decision in *Zietlin*. Their definition of obscenity under Penal Code 311.2, which is the model penal code approved in *Roth*, is that the test is whether the subject material is hard-core pornography utterly without redeeming social importance. This latter type falls without the category Constitutionally protected material.

All of the courts, including ours, do not want to act as censors; however, under all the decisions, there is a right granted to banish that which is obscene under the prevailing test. In *Zietlin* at page 920, the Supreme Court states: "By employing the term 'utterly,' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls in the latter category

is hard-core pornography. This language, indeed, is the language of *Roth;* as we have shown, subsequent Supreme Court decisions, State decisions, and commentators have interpreted to describe hard-core pornography."

We can deal in semantics at great length; however, the best expression is that of Justice Stewart—"When we see it, we know it." In "HONEY BEE" we have seen it and we know it to be obscene and to be hard-core pornography. *Judgment affirmed.*

Dated: Mar. 31, 1965

Edmund Scott, *P. J.*
Louis B. DeMatteis *J.*
Frank B. Blum *J.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

RATNER ET AL. *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO.

No. 10. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate Department of the Superior Court of California, County of San Mateo, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.